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No. 85-2088

# In the Supreme Court of the United States

OCTOBER TERM, 1986

ROGER'S TERMINAL AND SHIPPING CORPORATION,
PETITIONER

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an injured worker who has shown that he cannot perform his former job because of a job-related injury is entitled to compensation for a permanent total disability under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. II) 901 *et seq.*, where the employer has failed to produce any evidence that there are jobs available that the injured worker could secure and perform.

2. Whether substantial evidence supports the finding that the injured worker substantially complied with the requirements of Section 7(b)-(d) of the Act, 33 U.S.C. 907(b)-(d), for reimbursement of the medical expenses necessitated by his job-related injury.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 784 F.2d 687. The opinion of the Benefits Review Board (Pet. App. 15a-19a) is unreported. The administrative law judge's decision (Pet. App. 23a-31a) and order denying rehearing (Pet. App. 20a-22a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 12, 1986. The petition for a writ of certiorari was filed on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]Although the petition for a writ of certiorari cites 28 U.S.C. 2101(c) as the basis for jurisdiction, it is apparent that petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. 1254(1).

## STATEMENT

1. On May 21, 1978, respondent Emile Smith, an employee of petitioner Roger's Terminal and Shipping Corporation, injured his back when he slipped and fell while loading grain into the hold of a ship (Pet. App. 3a). Immediately after the injury, and with petitioner's authorization, Smith received hospital emergency care and was released to return to work (*id.* at 4a, 10a, 25a). Continuing to experience pain, Smith several days later consulted a private physician, Vernon R. Kroll, M.D., at the recommendation of his attorney (*id.* at 3a, 25a). Dr. Kroll examined Smith on May 25 and six days later prepared a report that Smith hand-delivered on June 9 to petitioner's compensation claims adjuster (*id.* at 13a, 25a). That report advised that Smith continued to suffer from a lumbosacral back strain and was to return for follow-up care (*id.* at 25a). Petitioner's claims adjuster was further advised both by phone before June 9 (*id.* at 13a) and in writing (*id.* at 25a) that Smith continued to require treatment, and that Dr. Kroll planned to refer him to a neurosurgeon (*ibid.*). Smith requested payment for this consultation and treatment but petitioner refused to provide or authorize it (*id.* at 11a, 25a). Rather, it directed Smith to be evaluated by John Garoutte, M.D. (*id.* at 29a). As a result of his July 17 evaluation, Dr. Garoutte agreed that Smith suffered from chronic lumbar strain and concurred in Dr. Kroll's course of treatment, although he anticipated a gradual recovery (*id.* at 3a, 6a, 25a).

On July 21, the consulting neurosurgeon, Donald Richardson, M.D., examined Smith and scheduled further study of the back by myelogram (Pet. App. 25a-26a). The claims adjuster was advised that Smith would be hospitalized for this procedure (*ibid.*). The July 31 myelogram revealed a blunting of the nerve root at the L-5 level on the left with an extradural defect comparable with a small ruptured disc (*id.*

at 26a). A lumbar laminectomy with removal of the L-5 disc was performed on August 3 and Smith was released from the hospital a week later (*ibid.*).

Smith was discharged from further medical treatment in November 1978, having attained maximum medical improvement (Pet. App. 4a, 26a). His surgeon advised Smith that the condition of his back prevented him from doing heavy lifting (75 pounds or more) or repeated bending (*id.* at 17a, 26a). That month, Smith left New Orleans to live with family in Natchez, Mississippi (*ibid.*). He did not thereafter obtain further employment (*id.* at 26a). Respondent's employment history consists exclusively of work as a laborer and longshoreman (*id.* at 4a, 17a, 26a). He has a seventh grade education and cannot read or write (*ibid.*).

2. Smith applied for disability compensation benefits and for payment of his medical expenses under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. II) 901 *et seq.* (LHWCA or the Longshore Act). After a hearing and consideration of Smith's testimony and all the medical evidence presented, an administrative law judge (ALJ) found that Smith could not return to his job as a longshoreman as a result of his work-related injury (Pet. App. 4a, 28a). Accordingly, Smith had established a prima facie case of disability and the burden shifted to petitioner to offer evidence of the general availability of realistic job opportunities the claimant could perform (*id.* at 4a, 6a, 27a-28a). In determining the extent of respondent's disability, the ALJ applied the established principle under the Longshore Act that disability is an economic concept that cannot be measured by a claimant's physical or medical condition alone,[2] but must also encompass consideration of

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[2]The medical reports introduced by Smith and petitioner stated that Smith had suffered permanent disability, but differed on the degree of his physical impairment (Pet. App. 4a, 25a-27a). Smith's neurosurgeon, Dr. Richardson, reported that Smith would continue to have an

other factors such as age, education, employment history, and the availability of suitable employment (*id.* at 5a, 27a). Since petitioner had not come forward with any competent evidence of available, suitable jobs, the ALJ concluded that Smith was totally disabled " 'until such time as [Smith] is able to find alternative employment or [petitioner] comes forward with evidence establishing that there are suitable, realistic jobs available to [Smith]' " (*id.* at 4a-5a, 21a, 29a).

Regarding petitioner's contention that it should not be held liable for Smith's medical treatment because it did not approve it and did not receive timely reports, the ALJ found that while petitioner, at the hearing, asserted willingness to provide medical treatment through Dr. Garoutte, the evidence showed that it in fact had retained him only to evaluate Smith (Pet. App. 29a). Further, the record showed that it was "clear that demand was made upon [petitioner] for authorization for payment of medical services rendered to Mr. Smith which [petitioner] refused to do" (*ibid.*), and that petitioner's insurance claims adjuster was fully aware of respondent's initial private medical treatment and hospitalization (*ibid.*).

3. The Benefits Review Board affirmed the award of disability compensation payments and medical benefits (Pet. App. 15a-19a). It agreed with the ALJ's statement of the applicable legal standards and upheld as supported by substantial evidence the ALJ's finding that petitioner had not come forward with competent evidence of the availability of suitable alternate employment and therefore had not

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estimated disability of 15-20% of the body as a whole, while petitioner's physician, Dr. Garoutte, estimated a 20% disability of the lumbar spine (*ibid.*). A third physician, who evaluated Smith in June 1980 by joint agreement of the parties, concluded that Smith had a permanent impairment of 5-10% of the whole man (*id.* at 4a) and should avoid repeated bending or lifting, and pulling or pushing more than 75 pounds (*id.* at 4a, 26a-27a).

carried its burden (*id.* at 17a, 18a). The Board also affirmed the ALJ's findings that petitioner's authorization was requested for Smith's medical treatment (*ibid.*). It noted that the petitioner's selection of Dr. Garotte was not controlling since Smith had a right both to choose his attending physician under 33 U.S.C. 907(b), and to consult a specialist under 20 C.F.R. 702.406 (Pet. App. 18a n.4).

4. The court of appeals affirmed. On the issue of disability, the court relied on "settled law that '[t]he degree of disability is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do.' " Pet. App. 5a (quoting *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1037-1038 (5th Cir. 1981)), and citing *Odom Construction Co.* v. *Department of Labor*, 622 F. 2d 110, 115 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981), and *Diamond M. Drilling Co.* v. *Marshall*, 577 F.2d 1003, 1005-1006 (5th Cir. 1978). The court stated that this concept of disability, combined with the statutory (see 33 U.S.C. 920) and case-law presumption of coverage (Pet. App. 6a), results in the "generally stated" rule that once "a claimant establishes a prima facie case of disability by showing he cannot perform his former job because of job-related injury[,] * * * the burden shifts to the employer to establish the availability of other jobs that the claimant could perform" (*ibid.* (citing *New Orleans (Gulfwide)*, 661 F.2d at 1038, and *Odom*, 622 F.2d at 115)). The court agreed with the Benefits Review Board that substantial evidence supported the ALJ's findings that Smith was unable to return to his former job because of his injury, and that petitioner had failed to produce any competent evidence of available jobs that Smith could perform.[3] The court of appeals therefore affirmed the compensation award. Because petitioner

[3]The court of appeals (Pet. App. 8a), like the ALJ (*id.* at 21a) and the Board (*id.* at 18a), refused to accept as competent evidence petitioner's attorney's unsubstantiated assertion, repeated here (see Pet. 8), that jobs existed in the community that Smith could perform.

had "wholly failed to introduce any evidence on job availability" (Pet. App. 8a n.2), the court found it unnecessary to rule on petitioner's assertion that courts should use a "sliding scale" to "place an extremely light burden on the employer * * * where the claimant's disability is slight and a correspondingly heavier burden * * * where the claimant's disability is severe" (*ibid.*).

As to medical costs, the court held that Smith had a right to choose his own physician pursuant to 33 U.S.C. 907(b); that substantial evidence supported the finding that petitioner had refused to authorize medical service; that petitioner was fully aware of Smith's initial treatment and hospitalization and should have been aware that Smith's treatment might include surgery; and that there was no record evidence that the physicians who treated Smith were not approved providers of medical care (Pet. App. 10a-13a). The court also ruled that the actual delivery of Smith's first private physician's report of treatment 15 days following that treatment rather than ten days as required by statute (33 U.S.C. 907(d)) should be excused because the report was prepared within ten days of initial treatment, resulting in substantial compliance with the regulations, and because petitioner "suffered no prejudice from the minimal delay," having known of the injury at the outset and of the treatment even before the written report was received (Pet. App. 13a).

## ARGUMENT

As petitioner acknowledges (Pet. 9, 13), the decision of the court of appeals regarding the determination of disability does not conflict with any decision of this Court or any other court of appeals. Indeed, the court below applied principles of law well established in other circuits as well as the Fifth Circuit, reviewed the evidence, and concluded that substantial evidence supported the ALJ's determination that the claimant was permanently and totally disabled

after November 24, 1978. The court's additional conclusions that substantial evidence supported the findings that petitioner had refused to authorize needed medical treatment and that late filing of a required report should be excused in the circumstances of this case are entirely fact-bound. The court's decision is correct and consistent with the purposes of the Longshore Act. Further review by this Court is therefore not warranted.

1. While petitioner does not contest the presumption that Smith suffered *some* disability (Pet. 12), it urges (*id.* at 13) that Smith should have been required to prove, before a permanent total disability may be presumed, that "his physical incapacity prohibits him from engaging in any employment and that he has made diligent attempts to procure some sort of remunerative employment." These proposed limitations on the presumption—and the correspondingly increased burden that petitioner proposes to place on claimants—would diverge from well-settled law based on the purposes of the Longshore Act.

In describing the burden of proof allocation, the court below followed principles adhered to not only in its own cases but also uniformly by the other circuits that have expressed their views. The rule generally stated is that when a claimant establishes a prima facie case of disability by showing that he cannot perform his former job because of a job-related injury, the burden shifts to the employer to show that there are other jobs available that the claimant could perform. *New Orleans (Gulfwide) Stevedores*, 661 F.2d at 1038, and cases cited therein. Accord, *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984); *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976); *McCabe* v. *Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 62 n.7 (3d Cir. 1979); *Newport News Shipbuilding* v. *Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177-1178

(8th Cir. 1979); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980).[4] Once the employer shows "employment opportunities * * * reasonably attainable and available" (Pet. App. 7a), a correlative burden arises for the employee to show "reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer" (*ibid.*). But "[t]his obligation to seek work does not alter the statutory presumption of coverage, nor the employer's initial burden of [proving] job availability" (*ibid.*, quoting *New Orleans (Gulfwide)*, 661 F.2d at 1043 (emphasis deleted)).[5]

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[4] *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), cited by petitioner as establishing a sliding scale of burdens of proof (Pet. 16-17), is irrelevant to this case. *Air America* involved the issue whether substantial evidence on the record as a whole—including evidence presented by the employer as to alternate employment the claimant could perform—supported an ALJ's finding of partial disability. Indeed, the court assumed that a presumption of disability had arisen, citing *American Stevedores, Inc.* v. *Salzano*, *supra*, as well as *Haughton Elevator Co.* v. *Lewis*, 572 F.2d 447, 451 (4th Cir. 1978), *Diamond M. Drilling Co.* v. *Marshall*, *supra*, and *Perini Corp.* v. *Heyde*, 306 F. Supp. 1321 (D.R.I. 1969), and enunciated a rule concerning the strength of the evidentiary showing that an employer must make to rebut the presumption of disability. Because petitioner here presented no evidence as to suitable alternative employment, *Air America* is inapposite.

[5] The court below correctly applied the law to the facts before it. Even though the undisputed evidence established Smith's incapacity to return to his former job, and even though existing decisions put petitioner clearly on notice that in the absence of anything further the disability would be found to be total, petitioner came forward with no evidence to show the general availability of suitable employment (Pet. App. 8a, 17a, 28a). Although petitioner contends (Pet. 10) that Smith lacked reasonable diligence in pursuing alternate employment, Smith's burden to show that he had sought alternate employment did not arise because of petitioner's failure to produce any evidence of available jobs. We note, moreover, that even if Smith did not complete job applications at the places where he inquired about work, as petitioner suggests (*ibid.*), that may be because Smith is unable to read or write (Pet. App. 26a).

This allocation of burdens is consistent with the structure and purposes of the Longshore Act. The central aim of the Act is to provide an injured worker with "compensation during the period of his illness or inability to pursue his usual employment * * *." H.R. Rep. 1767, 69th Cong., 2d Sess. 19-20 (1927). This Court has consistently held that its provisions "should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). Accord, *Director, OWCP* v. *Perini North River Assoc.*, 459 U.S. 297, 315-316 (1983); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

Disability is defined in the Longshore Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The statutory scheme provides different amounts of compensation for four classes of disability based on the extent and permanence of the disability (33 U.S.C. 908) but does not provide explicit standards for determining the extent or duration of disabilities not specifically scheduled in the statute. The Act does, however, establish a presumption (33 U.S.C. 920(a)) that in the absence of substantial evidence to the contrary, a claim comes within the provisions of the Act.[6] This presumption has been construed to govern issues of the nature and extent of the injury as well as issues of whether a specific injury

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[6]Section 20, 33 U.S.C. 920, states in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act.

falls within the Act's scope. *New Orleans (Gulfwide)*, 661 F.2d at 1038; *Duncanson-Harrelson Co.* v. *Director, OWCP*, 644 F.2d 827, 833 (9th Cir. 1981). Further, 33 U.S.C. 914(d) provides that an employer that disputes a claim for compensation must affirmatively set forth the grounds for contesting a claim, and 33 U.S.C. 922 permits an employer to apply for modification or termination of a compensation award because of changed circumstances. Both separately and cumulatively, these provisions establish congressional intent that a claim made under the Act will be presumptively credited unless the employer comes forward with substantial evidence to controvert it.

Moreover, this procedural allocation of the burden of coming forward with evidence is fair and reasonable, especially in light of the Longshore Act's compensatory purposes. When an employer concedes, as here, that a claimant has at least a partial disability, but proposes that there are some jobs which the claimant could secure and perform with his or her remaining ability, it is reasonable to require the employer, as the proponent of such a finding, at least to come forward with evidence of the availability of such jobs, before the claimant must show reasonable diligence in attempting to obtain such jobs.[7] See also 2 A. Larson, *The Law of Workmen's Compensation* § 57.61, at 10-164.95 to 10-164.113 (1983) (burden of proof allocation described here is sensible in light of the "well-known fact of modern economic life" that the demand for unskilled and semi-skilled labor is declining). Otherwise, injured workers would

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[7]This allocation of burdens is also entirely consistent with the rehabilitative purpose of returning an injured worker to the work force. That purpose can be fulfilled only if there are jobs available that the injured worker could perform. It is therefore reasonable to place on the employer the burden of coming forward with evidence of such jobs before requiring the worker to establish his or her inability to obtain such jobs.

be required to shoulder the "burden of proving a negative fact" (*New Orleans (Gulfwide)*, 661 F.2d at 1039 n. 13; *Bumble Bee Seafoods*, 629 F.2d at 1329), *i.e.*, the lack of suitable jobs, an almost impossible task. In sum, petitioner's contention that an injured worker incapable of returning to his former job should shoulder the additional burden of showing that "physical incapacity [prevents] him from engaging in any employment" (Pet. 13) is contrary to the statutory scheme and purposes and to the uniform course of decisions under the Act.

2. Petitioner's contentions (Pet. 17-21) that the court below improperly applied the requirements of Section 7(b)-(d) of the Act, 33 U.S.C. 907(b)-(d), regarding payment for medical services, are also without merit.

Petitioner contends (Pet. 17-18, 20) that the court of appeals erred in not requiring Smith to establish that the Secretary of Labor had specifically approved his physicians as qualified health care providers under the Act. This contention is insubstantial. Each of the physicians Smith consulted was a doctor of medicine (see Pet. App. 25a) as required by the pertinent regulation defining "physician" to include any "doctor of medicine (MD) * * * [operating] within the scope of their practice as defined by State law," and stating that "physicians in these categories are authorized by the Director to render medical care under the Act." 20 C.F.R. 702.404. Petitioner's assertion that there is a list of approved physicians from which Smith had to choose is simply without foundation.[8]

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[8]Prior to its amendment in 1984, the Act stated that the "Secretary *may* designate the physicians who are authorized to render medical care * * *." 33 U.S.C. 907(c) (emphasis added). The Secretary implemented the statute by the regulation quoted in text, but without issuing a separate list of authorized physicians. As amended, 33 U.S.C. (Supp. II) 907(c) provides that the "Secretary shall annually prepare a list of physicians and health care providers in each compensation district who are *not* authorized to render medical care" (emphasis added).

Petitioner's assertion (Pet. 6, 18-19) that Smith did not satisfy the requirements of Section 7(d) regarding obtaining an employer's prior authorization for medical or surgical services and filing a timely report raises entirely fact-bound questions not warranting further review. The ALJ specifically found that demand was made upon petitioner for authorization for payment of Smith's medical services but refused (Pet. App. 29a), and the court of appeals found this finding supported by substantial evidence (*id.* at 10a). Similarly, the ALJ found—and the court of appeals found supported by substantial evidence—that Dr. Kroll, Smith's first private physician, prepared the report within six days of his initial examination and that the claims adjuster received it 15 days after the initial consultation (*id.* at 13a, 25a). However, even before receiving the written report, petitioner had actual knowledge of both the injury and the treatment (*id.* at 10a-11a, 25a, 29a). Therefore, petitioner suffered no prejudice from the minimal delay in receiving the timely-prepared report (*id.* at 13a). Consequently, given the particular facts of this case, the court below appropriately concluded that the late filing was excusable. See 33 U.S.C. 907(d).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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